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COURT OF APPEALS
STATE OF NEW YORK

KATHLEEN HENRY,

Respondent,

-against-

NEW JERSEY TRANSIT, ET AL.,

Appellants.

NO. 11

20 Eagle Street
Albany, New York
February 7, 2023

Before:

ACTING CHIEF JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE SHIRLEY TROUTMAN

Appearances:

LAWRENCE MCGIVNEY, ESQ.
MCGIVNEY KLUGER CLARK & INTOCCIA
Attorney for Appellants
80 Broad Street
New York, NY 10004

BRIAN J. ISAAC, ESQ.
POLLACK, POLLACK, ISAAC & DECICCO
Attorney for Respondent
225 Broadway
17th Floor
New York, NY 10007

Cynthia R. Piett
Official Court Transcriber



1 ACTING CHIEF JUDGE CANNATARO: Our next appeal is
2 number 11, Henry v. New Jersey Transit.

3 Counsel, whenever you're ready.

4 MR. MCGIVNEY: Good afternoon, Your Honors. May
5 it please the Court. Lawrence McGivney, from the law firm
6 of McGivney Kluger Clark & Intoccia, on behalf of the
7 defendant appellants New Jersey Transit Corporation and
8 Rennaud Pierrelouis. The matter that is brought before
9 Your Honors today concerns New Transit - - - New Jersey
10 Transit's contention that it properly and timely asserted
11 the defense of interstate sovereign immunity.

12 JUDGE GARCIA: When did you assert it?

13 MR. MCGIVNEY: We asserted it the first
14 opportunity, which was on - - -

15 JUDGE GARCIA: Well, Hyatt - - -

16 MR. MCGIVNEY: - - - appeal.

17 JUDGE GARCIA: You could assert sovereign
18 immunity before Hyatt, right?

19 MR. MCGIVNEY: I couldn't assert the theory and
20 basis for sovereign immunity under Hyatt until Hyatt was
21 rendered.

22 JUDGE GARCIA: But you could have asserted a
23 sovereign immunity.

24 MR. MCGIVNEY: But not the sovereign immunity - -
25 -



1 JUDGE GARCIA: Understood.

2 MR. MCGIVNEY: - - - that we're alleging in this
3 case.

4 JUDGE GARCIA: But you could have asserted a
5 sovereign immunity, but you did not.

6 MR. MCGIVNEY: Under a theory of comity, Your
7 Honor, yes.

8 JUDGE GARCIA: But you did not.

9 MR. MCGIVNEY: We did not assert under a theory
10 of comity. And - - - and, in fact, we are not asking the
11 Court to consider sovereign immunity based upon prior
12 theories of comity.

13 JUDGE GARCIA: What if you had a new case and now
14 Hyatt's been decided, and you did not assert it? Same as
15 you did here, but now Hyatts been decided. This is a
16 hypothetical. And you get to the Appellate Division, and
17 you say, sovereign immunity; could you do that?

18 MR. MCGIVNEY: Well, I believe, Your Honor, that
19 one can assert it on appeal because it is a fundamental
20 constitutional right. That's not what we're dealing with
21 today, though.

22 JUDGE GARCIA: So you could pick - - - you know,
23 you get sued in Staten Island, you could say, hey, you
24 know, let's roll the dice. See what the jury comes back
25 with. You get a five-million-dollar verdict. You go up on



1 appeal and you say, sovereign immunity.

2 MR. MCGIVNEY: Well, that's what my adversary is
3 suggesting happened, but that - - -

4 JUDGE GARCIA: No, but I'm asking you.

5 MR. MCGIVNEY: No, Judge.

6 JUDGE GARCIA: Can you do - - - why can't you do
7 that under your rule?

8 MR. MCGIVNEY: Under my rule, Judge, so - - - let
9 me rephrase that. Could one bring that at that time? Yes,
10 because I believe it is a constitutional right that the
11 sovereign maintains to bring at any time, in the same way
12 one could do that with subject matter jurisdiction. That's
13 not what we're dealing with in this case, though. And I
14 think, it's important to keep in mind that we raised it
15 once it became a right that we could invoke.

16 JUDGE WILSON: Well, you could - - - you had time
17 to raise it in Supreme Court and you didn't, right?

18 MR. MCGIVNEY: No, we did not, Your Honor,
19 because that decision came down - - -

20 JUDGE WILSON: Wasn't it - - -

21 MR. MCGIVNEY: - - - in 2019.

22 JUDGE WILSON: I'm sorry. Wasn't it still
23 pending in Supreme Court, sub judice?

24 MR. MCGIVNEY: I apologize.

25 JUDGE WILSON: Wasn't Hyatt decided when the



1 action was still pending sub judice?

2 MR. MCGIVNEY: No. The - - - Hyatt was decided
3 in 2019 after the trial had happened and after the post-
4 judgment motions had been filed, and we were not at the
5 Appellate Division.

6 ACTING CHIEF JUDGE CANNATARO: But the post-
7 judgment motions hadn't - - -

8 JUDGE WILSON: Hadn't been decided.

9 ACTING CHIEF JUDGE CANNATARO: - - - been
10 decided.

11 MR. MCGIVNEY: No, the post-judgment motions had
12 been decided - - -

13 JUDGE WILSON: Are you sure about that?

14 MR. MCGIVNEY: - - - after Hyatt.

15 JUDGE WILSON: Does that make a difference to
16 your argument?

17 MR. MCGIVNEY: Your Honor, no, it doesn't, but
18 I'm just giving Your Honor the timetable that - - - as I
19 understand it to be. Because it was brought at that time,
20 when we had the first opportunity, that is why it was
21 timely filed.

22 JUDGE WILSON: But when you noticed your appeal
23 in the Appellate Division, did you mention sovereign
24 immunity at first?

25 MR. MCGIVNEY: In - - - once we got to the



1 Appellate Division, we - - -

2 JUDGE WILSON: When you noticed the appeal?

3 MR. MCGIVNEY: The notice of the appeal?

4 JUDGE WILSON: Yep.

5 MR. MCGIVNEY: No, Your Honor. We noticed it
6 once Hyatt became something that we thought we could - - -
7 we could raise. And it was not done for the purposes of
8 tactical advantage, as had been suggested.

9 JUDGE WILSON: So that may or may not be the
10 first opportunity you had, but it was a relatively early
11 opportunity; would you agree?

12 MR. MCGIVNEY: It was a rel - - - yes, Your
13 Honor. It was an early opportunity. And because it was
14 substantially different than the prior understanding of the
15 origin of sovereign immunity, which had emanated originally
16 from the theory of comity, rather than it being a situation
17 where the State of New York gets to decide whether or not
18 it will recognize the sovereignty and immunity of a state.
19 The decision in Hyatt now says that the individual state
20 gets - - -

21 JUDGE RIVERA: But if it's - - - if it's waivable
22 - - - you agree it's waivable, correct?

23 MR. MCGIVNEY: It could be, but it was not waived
24 in this case.

25 JUDGE RIVERA: Okay. If it could be, why - - -



1 why is it, then, subject matter jurisdiction, which is
2 never waivable?

3 MR. MCGIVNEY: It is akin to subject matter
4 jurisdiction. I wouldn't say it's identical to subject
5 matter jurisdiction. It is like it, but it is not exactly.

6 JUDGE SINGAS: But doesn't that go - - -

7 JUDGE RIVERA: All right. So you're saying that
8 SCOTUS jurisprudence, it's a U.S. Supreme Court
9 jurisprudence has somehow identified some hybrid - - -

10 MR. MCGIVNEY: It is - - -

11 JUDGE RIVERA: - - - understanding of personal -
12 - - you're in some grey area between personal and subject
13 matter - - -

14 MR. MCGIVNEY: I would say it is - - - it's - - -

15 JUDGE RIVERA: - - - jurisdiction?

16 MR. MCGIVNEY: I understand what you're saying.
17 It is not like personal jurisdiction. It is more akin to
18 subject matter jurisdiction.

19 JUDGE RIVERA: Why isn't it like per - - -

20 MR. MCGIVNEY: Because it is - - -

21 JUDGE RIVERA: Why isn't it like personal
22 jurisdiction? Why not?

23 MR. MCGIVNEY: I'll tell you why, Judge. Because
24 in this instance, the sovereign's rights is part of, like,
25 the tectonic plates, if you will, of how our government



1 runs, of how the states agreed that they would be
2 represented and defended when agreed to the Constitution.

3 And as Justice Thomas pointed out, at the very
4 beginning, when the states agreed that it would allow to
5 surrender certain rights, it was embedded in their belief
6 that they were maintaining their sovereignty. And part of
7 that is the right to decide how, when, and where they would
8 - - -

9 JUDGE WILSON: So how can - - -

10 MR. MCGIVNEY: - - - be sued.

11 JUDGE WILSON: How can you waive it? What are
12 the ways that you can waive it?

13 MR. MCGIVNEY: Sovereign immunity?

14 JUDGE WILSON: Yes.

15 MR. MCGIVNEY: Sovereign immunity, for example,
16 in New Jersey is waived in the circumstances of the New
17 Jersey Tort Claims Act.

18 JUDGE WILSON: So you could waive it by statute.
19 Can you waive it by conduct?

20 MR. MCGIVNEY: No, I don't believe you can waive
21 it by - - -

22 JUDGE WILSON: Can you waive it by agree - - -

23 MR. MCGIVNEY: You certainly cannot - - -

24 JUDGE WILSON: Can you waive it - - -

25 MR. MCGIVNEY: - - - waive it by - - -



1 JUDGE WILSON: Sorry. Can you - - - can you
2 waive it by agreement?

3 MR. MCGIVNEY: If one were to make a - - - a - -
4 - a specific overt agreement that - - - that it might be a
5 waiver.

6 JUDGE WILSON: But what if you go into court and
7 tell the court we're waiving sovereign immunity in this
8 case?

9 MR. MCGIVNEY: I think, at that juncture, one
10 might have difficulty saying, we didn't waive sovereign
11 immunity, if there was an overt explicit decision to waive
12 it. We don't have that in this case.

13 JUDGE RIVERA: So it - - - it has to be
14 expressed. Your position, I thought that's what you were
15 saying in your briefs, is there is no such thing as an
16 implied waiver of sovereign immunity.

17 MR. MCGIVNEY: That's ex - - -

18 JUDGE RIVERA: It doesn't matter what the conduct
19 is. It has to be expressed on the record.

20 MR. MCGIVNEY: Well, the Supreme Court has said
21 that it cannot be implied. That it is a fundamental right,
22 and it must be expressed.

23 JUDGE GARCIA: But is there a difference, though,
24 between, I think, what Justice Gorsuch, at least, describes
25 as structural immunity and Eleventh Amendment immunity?



1 MR. MCGIVNEY: There is a difference. First of
2 all, Eleventh Amendment immunity obviously pertains
3 strictly to federal court, right.

4 JUDGE GARCIA: And it's clearly subject matter.
5 I mean, federal courts don't have this authority to - - -

6 MR. MCGIVNEY: That is correct. That is correct.

7 JUDGE GARCIA: We're talking about - - - and - -
8 - and, I think, as you were getting at earlier, a sort of
9 structural immunity based on the history, as Justice Thomas
10 explained. And that, I thought, at least in Justice
11 Gorsuch's view, is more akin to personal jurisdiction.

12 MR. MCGIVNEY: Not at all, Judge. I would
13 disagree with that. It is more akin to subject matter
14 jurisdiction because some - - - some - - -

15 JUDGE GARCIA: Well, his statement in is,
16 structural immunity sounds in personal jurisdiction.

17 MR. MCGIVNEY: But in this instance, we're
18 talking about the - - - the sovereign's right to make a
19 decision as to whether or not, based upon, you know, the
20 very essence of the principles of a sovereign, as to how
21 and where it will be sued.

22 JUDGE TROUTMAN: And you're basing that on Hyatt?

23 MR. MCGIVNEY: Yes, Your Honor.

24 JUDGE TROUTMAN: And was waiver involved in
25 Hyatt? Was it decided that you can't waive in Hyatt?



1 MR. MCGIVNEY: No, Your Honor.

2 JUDGE TROUTMAN: And in Hyatt, in fact, it had
3 been asserted all the way through, correct? Sovereign
4 immunity?

5 MR. MCGIVNEY: Sovereign immunity, not in the - -
6 - on the basis on which it was ultimately decided the third
7 time around. Because if you recall, this was a case that
8 began, like, in 2000. And it was only on the third time up
9 on appeal, that the very issue was raised by the State for
10 sovereign immunity based upon this constitutional
11 principle.

12 JUDGE WILSON: So let me move from the
13 theoretical to the sort of practical. I'm crossing Fifth
14 Avenue. A New Jersey train - - - in Manhattan, on my way
15 to work, on foot. New Jersey Transit bus is speeding.
16 Runs a red light. Knocks me over. Hurts me. Maybe kills
17 me. Your view is you can only be sued in New Jersey, not
18 in New York for that?

19 MR. MCGIVNEY: My view is that the State of New
20 Jersey has a right to assert its sovereign immunity. And
21 if it does so, you certainly have a right to sue New Jersey
22 Transit.

23 JUDGE WILSON: But only in New Jersey?

24 MR. MCGIVNEY: But that's in - - - that - - -

25 JUDGE WILSON: Even though I'm a resident of New



1 York City; I was injured in New York City; and the New
2 Jersey Transit bus was breaking a variety of New York state
3 laws?

4 MR. MCGIVNEY: That is because New Jersey - - -

5 JUDGE WILSON: I'm just asking - - -

6 MR. MCGIVNEY: Yes - - -

7 JUDGE WILSON: - - - what the consequence is.

8 MR. MCGIVNEY: - - - Your Honors, that is exactly
9 right.

10 JUDGE WILSON: I can only sue you in New Jersey?

11 MR. MCGIVNEY: That is correct, Your Honor.

12 JUDGE WILSON: And only if you waive there?

13 MR. MCGIVNEY: Well, and they do waive there
14 under New Jersey Tort Claims Act.

15 JUDGE WILSON: No. Right. But they wouldn't
16 have to.

17 MR. MCGIVNEY: There are plenty of cases that are
18 - - - currently in New Jersey that are based upon suits
19 going - - -

20 JUDGE WILSON: Well, I understand that. But your
21 view is they could repeal the torts - - - you know, claim
22 statute in New Jersey and - - - and rest on a sovereign
23 immunity, and they would be not liable for that at all.

24 MR. MCGIVNEY: Sovereign reserves the right to do
25 that, Your Honor. That is by the nature of a sovereign.



1 JUDGE WILSON: Okay.

2 JUDGE RIVERA: What - - - what if taking Judge
3 Wilson's hypothetical, you violated, in that hypothetical,
4 New York law. And you're saying just because it has to
5 only be heard in New Jersey, you couldn't hear a violation
6 - - - the court would not be able to determine - - -

7 MR. MCGIVNEY: I'm saying New York - - -

8 JUDGE RIVERA: - - - violation of New York law?
9 Because it's just a question of the forum, correct?

10 MR. MCGIVNEY: Your Honor, I'm saying that New
11 York doesn't have the authority or right to tell New Jersey
12 that you can be sue - - - that you're going to be sued in
13 New Jersey, because it is their sister state imposing upon
14 another state where it can happen.

15 JUDGE RIVERA: No, no. But I'm not clear what
16 that has to do with whether or not New Jersey acts in a way
17 that it has let New York courts know that it is amenable
18 and willing to be sued in New York. I'm not - - - I'm not
19 really understanding the - - - this is about the waiver,
20 sure. Let's go with what you've just said. But if you
21 waive then you can proceed in New York courts, correct?

22 New Jersey, for whatever reason, might decide in
23 some other case, obviously not this and the other cases at
24 issue, that it's to its benefit to proceed in New York.
25 Perhaps, as Justice Garcia suggested.



1 MR. MCGIVNEY: Well - - -

2 JUDGE RIVERA: You know, you want to throw the
3 dice, maybe you'll win, and you'll be done with it.

4 MR. MCGIVNEY: Well, we have seen cases and the
5 Supreme Court has considered cases - - - I believe, there's
6 one in Georgia - - - where a state chose to move to - - -
7 to bring a case into federal court.

8 JUDGE RIVERA: Uh-huh.

9 MR. MCGIVNEY: And then said, you waived because
10 you brought the case in federal court.

11 JUDGE GARCIA: That was an Eleventh Amendment
12 case, and it was an action showing waiver by bringing it
13 into a federal jurisdiction.

14 MR. MCGIVNEY: That is correct.

15 JUDGE GARCIA: But I just don't see the analogy
16 with the Eleventh Amendment cases here. I mean, it's such
17 a different animal. And before it was comity, it's been
18 changed. And the Supreme Court changed it as a matter of
19 constitutional law, but now we have to decide when can you
20 assert that, right? And if there's no mo - - - longer
21 comity, does that - - - should that affect, as a policy
22 matter, our decision on when we say it's waived?

23 MR. MCGIVNEY: Your Honor, I think that it comes
24 down to that the State reserves its right to wai - - - to
25 assert that defense. We are not dealing with a case where



1 this specific type of immunity existed because it had not
2 been articulated by the Supreme Court and that was sat on.
3 That's not what we're dealing with, right? We're dealing
4 with a case where it was already tried. Post-judgment.
5 We're in the Appellate Division. And now that right was
6 created.

7 JUDGE GARCIA: But we also have to think of the
8 next fifty cases that are going to come into New York
9 court, right? So it may not be these facts. And the rule
10 we set on, when you have to raise it, will affect all those
11 other cases, right?

12 MR. MCGIVNEY: Certainly, that is a question down
13 the road. I don't think it's necessary for the purposes of
14 deciding this specific question, Your Honor, in this
15 specific case, as to whether or not New Jersey Transit, in
16 the Henry case, sat on its right.

17 ACTING CHIEF JUDGE CANNATARO: Thank you,
18 Counsel.

19 MR. MCGIVNEY: Thank you, Your Honors.

20 MR. ISAAC: Good afternoon, Your Honors. May it
21 please the court. Brian Isaac. I represent the plaintiff-
22 respondent. I'd like to start off my argument with just a
23 hypothetical, since we've been using some hypotheticals.
24 And here's my hypothetical. And I'm going to deal both
25 with the structural immunity substantively, and I'm going

1 to deal with the waiver as well.

2 State of New York and the City of New York decide
3 that they're going to develop a property in New York City
4 to assist disadvantaged people, both tenants and
5 businesses. And they do that. They develop a small
6 property.

7 On the ground floor of the property, they have
8 certain residential and commercial properties. They also
9 have a restaurant. And on the outside of the restaurant,
10 like we have in New York, we have some outside dining. And
11 assume for purposes of my hypothetical that a New Jersey
12 Transit bus operator who is drunk, speeding, and texting
13 runs into that building, injuring people on the sidewalk,
14 injuring the building, destroying businesses, and
15 essentially, totaling that scenario.

16 As I understand the current state of the law in
17 New York, as articulated by the First Department in the
18 Belfand and the Colt decisions, New York cannot, I want to
19 repeat that, cannot sue New Jersey at all. Not only
20 because of the immunity issues we're talking about, but
21 because New Jersey has a specific venue provision that says
22 that in actions, such as those - - - personal injury
23 actions or negligence actions - - - those suits have to be
24 brought in the forum where they occurred, which would be in
25 New York.



1 And as you know, from reading all of the cases,
2 every single case, New Jersey has not - - - New Jersey
3 Transit has not waived any statute of limitations claims;
4 they're asserting them. And as I understand their claims
5 dealing with sovereign immunity, they say they have the
6 right to refuse, absolutely, absent an express consent.

7 Personally, I don't believe that the Supreme
8 Court said that. And I would like to refer you to the case
9 of Raygor, which is actually cited by my adversary, against
10 Regents University in Minnesota. It's at 534 U.S. 533 at
11 547. And this is what the court said. For waiver to be
12 found, the courts also consider voluntary invocation of
13 jurisdiction, voluntary submission to jurisdiction, or
14 litigation conduct.

15 Now, my adversary says to you, there was no way
16 in the world that we could have even known about this kind
17 of sovereign immunity until Hyatt III was decided. Let me
18 suggest to you that that's just incorrect. As you know,
19 from reading the briefs, there wasn't one Hyatt case; there
20 were three Hyatt cases. And in every single case, Hyatt
21 asserted immunity, whether you call it sovereign imm - - -
22 it's not really sovereign immunity. As Judge Garcia said,
23 it's a kind of mix. It's inimical immunity.

24 JUDGE WILSON: Well, you sort of have to predict
25 from Hyatt II, that Hyatt III would come out the way it did



1 after, I think, the change in the Supreme Court's
2 composition. Which is a bit of a tall order.

3 MR. ISAAC: Well, I think, what I would say to
4 you on that, Judge -- Judge Wilson, is that when you talk
5 about overruling cases, I think, the Belfand court got this
6 right. We disagree that New Jersey Transit is an arm of
7 the State. And I'll get to that in a second. But I think
8 the Belfand court had this right.

9 What they said was, sovereign immunity isn't a
10 new concept. It's been a concept that's been around
11 forever. It's been a concept that's been around both
12 statutorily and constitutionally. And therefore, the fact
13 that you might have not thought that you had a very, very
14 good claim doesn't mean that it's a change in the law.

15 And in fact, if you go back to some of your
16 decisions, because I was preparing for this last night in
17 the hotel, it's actually funny. This goes back to
18 Blackstone. Blackstone said that where a court overrules a
19 decision, the court is not - - - is not making new law on
20 the theory that judges don't make laws; they interpret
21 laws. And there's actually a case that was decided a long
22 time ago. I'm sorry. I probably should have included it
23 in my brief.

24 It's People ex Rel. Rice against Graves. It's a
25 242 A.D. 128. The quotes were at 131 to 132. It's



1 affirmed by this court at 270 New York 498, which said
2 exactly that.

3 So the notion that New Jersey Transit was somehow
4 impotent in raising this claim is just simply not true.
5 But let's talk about what the other side of the coin is,
6 because judges are referees. They have to look not just at
7 one side; they have to look at the other side.

8 If New Jersey Transit comes to this court and
9 says to this court, hey, I, as an entity, didn't know about
10 this particular defense that was there. What about the
11 plaintiff's lawyer in Manhattan? He's supposed to know?
12 So the plaintiff should get nonsuited? New Jersey
13 Transit's coming to the New York State Court of Appeals,
14 which deals with New York state issues for the benefit of
15 New York state's citizens.

16 JUDGE RIVERA: Well, the real issue is, right,
17 they - - - they are not going to waive the statute of
18 limitations. Otherwise, you could proceed in Jersey; isn't
19 that - - -

20 MR. ISAAC: On the - - -

21 JUDGE RIVERA: If you're going down this rabbit
22 hole, isn't that really the problem?

23 MR. ISAAC: Well, actually, the - - - the answer
24 is no. And that's the Colt case.

25 JUDGE RIVERA: Oh, okay.



1 MR. ISAAC: Okay. The New Jersey venues
2 provision says - - - I didn't write it, but it says it, for
3 whatever reason, that you have to bring a tort claim, like
4 this, in the place where it arose. That's New York. So I
5 can't bring it. And that's what got the Colt court to kind
6 of change back from Belfand. They're saying, where are you
7 going to sue?

8 JUDGE GARCIA: So - - -

9 MR. ISAAC: You're not going to leave someone
10 without a remedy.

11 JUDGE GARCIA: So Counsel, I'm sorry. I may be
12 misunderstanding your argument. Is it that the reason why
13 we should deny the sovereign immunity case - - - defense in
14 this case is because you have no remedy in New Jersey?

15 MR. ISAAC: No. No. That's not what I'm saying
16 at all. I'm saying they waived it by their own affirmative
17 litigation conduct. But what I'm suggesting is that --

18 JUDGE GARCIA: But why are we talking about what
19 would happen in New Jersey if you went there?

20 MR. ISAAC: I'm just suggesting to the Court that
21 in - - - in the way the law is currently framed, we don't
22 even have a remedy in New York. That's all. I - - -

23 JUDGE GARCIA: And that may be a problem in a
24 different case - - -

25 MR. ISAAC: Fair enough.



1 JUDGE GARCIA: - - - right?

2 MR. ISAAC: Fair enough. If I can, I - - - so I
3 don't think there's any question here that there was a
4 waiver. But I'd like to, if I can, talk about the
5 substantive elements as well because that may be - - - it
6 might not affect my case, but it may affect other cases.

7 New Jersey Transit is obviously not the State.
8 It's an arm of the State. And arms of the State are not
9 equivalent to public entities.

10 My position is - - -

11 JUDGE WILSON: That seems like something that is
12 not fully flushed out on the record here, right? I mean,
13 it - - - you didn't have any reason to - - - to worry about
14 that until you get met in the Appellate Division with - - -

15 MR. ISAAC: Right.

16 JUDGE WILSON: - - - an argument that they're - -
17 - they're immune sovereign?

18 MR. ISAAC: That's correct.

19 JUDGE WILSON: So I mean, I take your point, but
20 I don't know which way it'll come out because I feel we're
21 sort of handicapped by the procedural posture this is
22 going.

23 MR. ISAAC: It's a fair enough point and I - - -
24 I don't disagree with it. But I would like to try to make
25 the point that if you look at the New Jersey Tort Claim



1 Act, itself, and you look at the three-factor decision in
2 Fitchik, which held that New Jersey Transit wasn't an arm
3 of the State until it got reversed, we think, improperly in
4 - - - by the Third Circuit in Karns. If you look at what
5 the New Jersey legislature said, forget about Brian Isaac,
6 forget about Brian Shoot, forget about the New York state
7 trial lawyers. Let's look at what the New Jersey
8 legislature, themselves, said.

9 Three - - - there were three factors in Fitchik.
10 The first, whether any judgment will be paid from the State
11 treasurer. Fitchik at 873 F.2d 659. New Jersey statute.

12 JUDGE GARCIA: Counsel, do you think that this
13 court really should be engaged in that analysis at this
14 point in the case? Wouldn't it be that if we were to agree
15 that sovereign immunity could be asserted here, it would go
16 back for that determination?

17 MR. ISAAC: That's - - - that's a way to handle
18 it. I'm not suggesting it isn't, but I think that if you
19 look at the statutory scheme, itself, there's enough here
20 for this court, as interpreted by the Hess decision,
21 because the Hess decision is a United State Supreme Court
22 decision, to say that New Jersey Transit is not an arm of
23 the State.

24 So I have no problem going back to the Appellate
25 Division. I have no problem going back to the trial court



1 and having an evidentiary hearing. And Judge Wilson,
2 you're right. There is none of the discussion that you see
3 in Mancuso, or in Hess, or in the other public cases
4 because those were all litigated at the time. And we got
5 the brief, right.

6 JUDGE WILSON: Yeah.

7 MR. ISAAC: We didn't even know this was coming
8 in, and it was not in the notice of appeal, and it was not
9 in the pre-argument stage.

10 JUDGE SINGAS: So what are you asking for,
11 Counselor?

12 MR. ISAAC: Well, I'm asking - - - first - - -
13 first thing I want to do is I want to win. So if I win by
14 waiver, that's fine. I'll take it. If you're going to
15 decide the case substantively, I'd like you to hold that
16 New Jersey Transit is not an arm of the State.

17 JUDGE RIVERA: But why - - - why isn't it correct
18 that it has to be an express waiver and you don't have that
19 here?

20 MR. ISAAC: Well, because litigation conduct can
21 waive based on the Lapidus case. That's the United States
22 Supreme Court case I've had. And by the way, it's no
23 different in this court. I know it doesn't deal with the
24 sovereign immunity issue. But one of the famous cases that
25 this court has is Martin against City of Cohoes.



1 JUDGE RIVERA: Is that - - - does your position
2 hold up if we are persuaded by this argument that given the
3 Supreme Court decisions, Hyatt III, that, you know, the
4 sovereign immunity argument really falls into the basket of
5 subject matter jurisdiction? It's more like that than it
6 is personal jurisdiction.

7 MR. ISAAC: Well, I think, as Judge Garcia said,
8 the PennEast case makes it pretty clear that it - - - it
9 isn't. There's a difference between - - - and I'm not
10 going to go over my time. I'm just - - - let me finish the
11 - - - the response, if I can.

12 Eleventh Amendment immunity deals with federal
13 court. We're in state court. We're dealing with that
14 hybrid. And the PennEast case specifically says that it
15 sounds in personal jurisdiction, which was definitely - - -

16 JUDGE GARCIA: I think, that was the dissent,
17 sadly. I - - - I think, Justice Gorsuch that I quoted was
18 actually a dissent. He wasn't dissenting on that issue.
19 It's an articulation of the difference.

20 MR. ISAAC: Right. I'm talking - - - I know
21 you're taking about with Gorsuch's opinion.

22 JUDGE GARCIA: Yeah.

23 MR. ISAAC: But on PennEast, it's a subsequent
24 case that deals directly with it.

25 JUDGE RIVERA: Well, I think, the point is it may



1 not really be as settled as you suggest.

2 MR. ISAAC: I'm sorry.

3 JUDGE RIVERA: It may not be as settled as you
4 suggest - - -

5 MR. ISAAC: Well - - -

6 JUDGE RIVERA: - - - I think, is the point.

7 MR. ISAAC: - - - that - - - that's going to be
8 up to you - - -

9 JUDGE RIVERA: I'll admit that.

10 MR. ISAAC: - - - but I hope it is. If you have
11 no further questions, I'll sit down and let - - - rest on
12 my brief. Thanks for listening.

13 ACTING CHIEF JUDGE CANNATARO: Thank you,
14 Counsel.

15 MR. MCGIVNEY: Briefly, Your Honor, Hyatt didn't
16 really address the issue of whether or not there was a
17 waiver to immunity. It looked at the question of what was
18 the origin of sovereign immunity. That's what it looked
19 at. And its decision was a sea change from what comity was
20 because it shifted who had the right to decide to invoke
21 sovereign immunity.

22 From the state that was actually the one that was
23 being sued or the one that was entertaining the suit. And
24 that sea change happened while our case was on appeal.

25 JUDGE RIVERA: But why does that make it more



1 like subject matter jurisdiction than personal
2 jurisdiction?

3 MR. MCGIVNEY: Because it was part of the very
4 fabric of what the states were willing to allow themselves
5 to be subjected to, right. Way back when they were putting
6 together the Constitution, they were worried about
7 maintaining their sovereign independence. And so it was a
8 fundamental right of the State to be able to pick and
9 choose the circumstances under which it would subject
10 itself to suit.

11 I disagree with Counsel when he says that - - -

12 JUDGE RIVERA: That begins to sound a lot like
13 personal jurisdiction. Like a person consents to be sued
14 in a particular jurisdiction.

15 MR. MCGIVNEY: But that only exists, Your Honor,
16 because under the circumstances, the sovereign has made
17 that decision, right. And the sovereign has made that
18 decision in New Jersey and said, we will permit ourselves
19 to be sued in New Jersey under these circumstances, under
20 the tort claims act, which doesn't count or give waiver.

21 JUDGE RIVERA: Well, the fact that you'd always
22 consent to that doesn't mean that your conduct here doesn't
23 end up being a waiver.

24 MR. MCGIVNEY: I understand, Your Honor.

25 JUDGE RIVERA: All right.



1 MR. MCGIVNEY: All right.

2 JUDGE GARCIA: Has your - - - has the - - - your
3 client consent - - - ever challenged or asserted a
4 sovereign immunity defense in New York under the comity
5 rule?

6 MR. MCGIVNEY: I don't believe so. And Judge, I
7 don't think that's relevant to our consideration because
8 I'm not asking this honorable court to consider whether or
9 not we were entitled to sovereign immunity under comity.

10 JUDGE GARCIA: I'm just curious as to why you
11 didn't assert it here.

12 MR. MCGIVNEY: You know, Judge, if I had asserted
13 it, I would not be arguing before you today that I should
14 be entitled to in sovereign - - - sovereign immunity based
15 on comity, because that's not the basis under which we are
16 seeking it.

17 JUDGE GARCIA: Yeah. But at least you would have
18 alerted the court to that fact, that you weren't raising a
19 sovereign immunity defense in your - - -

20 MR. MCGIVNEY: But that would not - - - but that
21 would not preclude me from bringing that new vert - - - the
22 new understanding of the basis of sovereign immunity based
23 upon the decision in Hyatt. They are two separate
24 theories.

25 JUDGE RIVERA: Does the - - - the theory comity



1 for sovereign immunity, does that even exist now?

2 MR. MCGIVNEY: I don't think it does. Not after
3 - - -

4 JUDGE RIVERA: Why would any state waste their
5 time on that? I mean, you didn't even want to waste your
6 time on that - - -

7 MR. MCGIVNEY: Not after - - -

8 JUDGE RIVERA: - - - when you didn't know how the
9 court would rule. You - - - you - - - right? You were
10 positive that the court will not rule favorably.

11 MR. MCGIVNEY: If - - - if I were to have - - -
12 just ending on this.

13 JUDGE RIVERA: Uh-huh.

14 MR. MCGIVNEY: If on appeal, prior to the Hyatt -
15 - - if during the course of the case - - - at the start of
16 the case - - - in the course of the case, I had sought to
17 have the case dismissed under theory of sovereign immunity
18 based upon the embedded nature in the contract - - - in the
19 constitution, the court would have asked me, what is the
20 basis for that? Where - - - where's the court - - - what
21 case law says that you have that authority? Because your
22 authority comes from comity. I would have had nothing to
23 rely upon because - - -

24 JUDGE WILSON: Well, except - - -

25 MR. MCGIVNEY: - - - I didn't have that right.



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JUDGE WILSON: Except that - - - except the people in Hyatt made exactly that argument for years.

MR. MCGIVNEY: And in fact, though, it was finally given to the State based upon the decision by the Supreme Court.

ACTING CHIEF JUDGE CANNATARO: Thank you.

MR. MCGIVNEY: Thank you, Your Honors.

(Court is adjourned)



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C E R T I F I C A T I O N

I, Cynthia R. Piett, certify that the foregoing transcript of proceedings in the Court of Appeals of New Jersey Transit et al. v. Kathleen Henry, No. 11 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Signature: Cynthia R. Piett

Agency Name: eScribers

Address of Agency: 7227 North 16th Street
Suite 207
Phoenix, AZ 85020

Date: February 10, 2023

